STATE OF MICHIGAN
IN THE SUPREME COURT

TEDDY 23, LLC, a Michigan limited liability company, and MICHIGAN TAX CREDIT FINANCE, LLC, a Michigan limited liability company d/b/a MICHIGAN PRODUCTION CAPITAL,

Plaintiffs/Appellants,

v

MICHIGAN FILM OFFICE and MICHIGAN DEPARTMENT OF TREASURY,

Defendants/Appellees.

_____/

Supreme Court Docket No. _____

Court of Appeals No. 323299, 323424

Lower Court No. 14-702-AA
Ingham County Circuit Court
Hon. Rosemarie E. Aquilina

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STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND THE RELIEF SOUGHT

Plaintiffs-Appellants, Teddy 23, LLC ("Teddy 23") and Michigan Tax Credit Finance, LLC ("MPC"), (collectively "Plaintiffs") seek leave to appeal the Court of Appeals' December 15, 2015 unpublished per curiam opinion and its February 12, 2016 order denying Plaintiff-Appellant's motion for reconsideration. (*Teddy 23 LLC v Michigan Film Office*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015) (Docket Nos. 323299, 323424; **Appx 1**; Order Denying Motion for Reconsideration, 2/16/16; **Appx 2**). The litigation concerned the Department of Treasury's ("Department") statutory obligations under the Taxpayer Bill of Rights legislation as it applied to the appellate procedures regarding administration of the Michigan Business Tax ("MBT") Act's film credit statute (MCL 208.1455; "film credit statute").

The Court of Appeals' Opinion affirmed an order of the Michigan Court of Claims, which determined that the Department's audit, required taxpayer advice, and decisions regarding film credit statute (was not subject to the "Revenue Act" (MCL 205.1; *et seq.*). The Court of Appeals' December 15, 2015 opinion is the first appellate decision construing the Revenue Act to be inapplicable to the Department's audit activity under the film credit statute. The Court of Appeals also found that the Ingham County Circuit Court did not abuse its discretion in failing to address or remedy Plaintiffs' denial of due process.

The Department's contention in this case, joined by the Michigan Film Office ("Defendants") was the first time either agency contested the jurisdiction of the Michigan Court of Claims or the applicability of the Revenue Act to the film credit statute. Their new position was a retroactive reversal of the Department's published guidance, contrary to the legal position that they took on the same issue in federal and state courts that jurisdiction of film credit claims

resided exclusively in the Michigan Court of Claims, and a departure from their consistent practice of litigating film credit cases in the Michigan Court of Claims. In addition, the Defendants' position was directly contrary to their actions and advice to Plaintiffs in this case.

The Court of Appeal's Opinion failed to construe Section 5 of the Revenue Act, governing taxpayer protection (the "Taxpayer Bill of Rights;" 1993 PA Nos. 13 and 14) in regards "to a departmental action administering or enforcing a tax statute" and failed to address Appellant's claim that the Defendants were judicially estopped from arguing a directly contrary legal position taken in Michigan courts. Having determined that the "Taxpayer Bill of Rights" was not applicable to the Department's administrative actions regarding the film credit, the Court of Appeals erroneously upheld its retroactive change in administrative position.

Plaintiff-Appellant respectfully requests that this Court grant leave to appeal the Court of Appeals' misconstruction of the Revenue Act. Plaintiff-Appellant respectfully requests that this Court vacate the Court of Appeals' decision and remand this matter to the lower court for adjudication of Plaintiff's entitlement to the film credit.

STATEMENT OF JURISDICTION OF THIS COURT

This Court has jurisdiction to review Respondent-Appellant's application for leave to appeal the Court of Appeals' opinion under MCR 7.303(B)(1). Respondent-Appellant timely filed a motion for reconsideration that was denied by the Court of Appeals by order dated February 12, 2016. **Appx 2**. This application is being timely filed within 42 days of the Court of Appeals' order denying reconsideration. MCR 7.305(C)(2)(b).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT MCL 205.5 OF THE TAXPAYER BILL OF RIGHTS WAS NOT APPLICABLE TO THE DEPARTMENTAL ACTION ADMINISTRATING THE FILM CREDIT STATUTE OF THE MBT ACT AND THAT THE NOTICE OF APPELLATE PROCEDURES REQUIRED IN MCL 205.5 WAS NOT THE PROCESS DUE TAXPAYERS BUT WAS INSTEAD A COURTESY THAT NEED NOT BE COMPLETE NOR ACCURATE?

Plaintiffs-Appellants answer "Yes."
Defendants-Appellee would answer "No."
The Court of Appeals would answer "No."
The Lower Courts would answer "No."

II. DID THE COURT OF APPEALS ERR IN PERMITTING THE DEPARTMENT TO RETROACTIVELY CHANGE A PUBLISHED LEGAL POSITION THAT WAS INCONSISTENT WITH REPEATED REPRESENTATIONS TO COURTS THAT JURISDICTION OF FILM CREDIT CLAIMS RESIDED IN THE COURT OF CLAIMS?

Plaintiffs-Appellants answer "Yes."
Defendants-Appellee would answer "No."
The Court of Appeals would answer "No."
The Lower Courts would answer "No."

III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN THE CIRCUIT COURT FAILED TO REMEDY THE DENIAL OF DUE PROCESS AND IN INSTEAD PERMITTED A RETROACTIVE CHANGE IN THE DEPARTMENTS INTERPRETATION OF LAW THAT CONFLICTED WITH ITS LEGAL POSITION TAKEN IN OTHER MICHIGAN COURTS?

Plaintiffs-Appellants answer "Yes."
Defendants-Appellee would answer "No."
The Court of Appeals would answer "No."
The Lower Courts would answer "No."

IV. DID THE COURT OF APPEALS ERR IN FAILING TO DETERMINE THAT THE COURT OF CLAIMS HAD SUBJECT MATTER JURISDICTION?

Plaintiffs-Appellants answer "Yes."
Defendants-Appellee would answer "No."
The Court of Appeals would answer "No."
The Lower Courts would answer "No."

V. DID THE COURT OF APPEALS ERR IN FAILING TO PROVIDE ANY RELIEF FOR A DENIAL OF DUE PROCESS AND THE DEPARTMENT'S RETROACTIVE INTERPRETATION OF LAW INCONSISTENT WITH ITS EXISTING LEGAL POSITION?

Plaintiffs-Appellants answer "Yes."
Defendants-Appellee would answer "No."
The Court of Appeals would answer "No."
The Lower Courts would answer "No."

VI. DID THE COURT OF APPEALS ERR IN FAILING TO ADDRESS PLAINTIFFS' CONSTITUTIONAL CLAIMS THAT IT WAS DENIED ITS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION?

Plaintiffs-Appellants answer "Yes."
Defendants-Appellee would answer "No."
The Court of Appeals would answer "No."
The Lower Courts would answer "No."

INTRODUCTION

Teddy 23, appellant, is a film maker. In the course of making a movie in Michigan Teddy 23 sought a Michigan Business Tax credit for $6.3 million from the state pursuant to MCL 208.1455.

This request precipitated an audit conducted by Department of Treasury personnel operating evidently on behalf of the Michigan Film Office. The audit, riddled with errors and based on a misunderstanding of how this company and the film business generally operates, was unfavorable to Teddy 23. A denial of the credit issued. What did not issue, then or ever, was the mandatory notice to Teddy 23 under MCL 205.5 of how and where to appeal.

Left to its own devices after the state breached its duty to inform Teddy 23 of how and where to appeal, the company and its lawyers, sensibly enough, researched where appeals of such denials are properly filed and discovered an unbroken line of cases where the Department had taken an administrative position, through its filings, that venue was proper in the Court of Claims. Relying on this, and back-stopped by an understanding of estoppel law, Teddy 23 filed its appeal in the Court of Claims.

Surprisingly, given the past practices of the Department, the Department claimed by motion that the Court of Claims was an improper venue for Teddy 23's appeal and indicated that it now held the view that proper venue was in Circuit Court where, given the time already expired, the filing period for an "of right" appeal had passed. The Court of Claims agreed with the Department and dismissed the case without prejudice.

While awaiting a decision from the Court of Claims, Teddy 23 filed in the Ingham Circuit Court, seeking leave to appeal confident that there was obviously good cause for Teddy 23's delay and that any court would be inclined to give Teddy 23 a hearing (and due process thereby)

has no judicial officer either in the Department or a court had considered this case. Not so, as Judge Aquilina, in what appears to the former judge in Teddy 23's appellate team to be little more than a housekeeping/docket cleaning order, dismissed the case and felt no need then or on reconsideration to give a rationale that suggested any familiarity with the procedural or factual merits.

This decision was appealed to the Court of Appeals. They at least gave an opinion, but unfortunately they misunderstood, in our view, the thrust of our arguments.

The strongest of these arguments is that under the Michigan Supreme Court's recent decision in *Fradco Inc. v Dep't of Treasury,* 495 Mich 104, 114; 845 NW2d 81 (2014), the failure to give the required appellate information to Teddy 23 makes a nullity of the Department's subsequent actions. Simply stated, Teddy 23 doesn't need to be appealing anything because there has not yet been a denial. As *Fradco* instructs, there can't be a denial until it is accompanied by the required notice. Accordingly, this court should enter an order remanding to the Department to do its denial and notice as the legislature directed. The appeal can then ensue. Alternatively, this court can shorten this process up by simply remanding to which ever court our appeal should be in for a hearing on the merits.

Further, should this court feel there is some uncertainty about the scope of *Fradco* and whether it applies in a dual administrative agency context such as we have here, leave should be granted to let this be addressed and not leave *Fradco* as a hollowed out precedent.

GROUNDS FOR REVIEW PURSUANT TO MCR 7.305(B)

I. THE COURT OF APPEALS OPINION INVOLVES A SUBSTANTIAL QUESTION ABOUT THE VALIDITY OF A LEGISLATIVE ACT – MCR 7.305(B)(1).

This case involves the applicability and import of the Taxpayer Bill of Rights as found in in the Revenue Act. 1993 PA 13, 14.

The Department audited Plaintiffs' request for a previously approved MBT film credit and its audit determination resulted in the denial of a $6.3 million credit. The Department and Film Office contended that the Department's actions fell outside the Taxpayer Bill of Rights provisions of the Revenue Act. The Court of Appeals agreed and further concluded that the Taxpayer Bill of Rights did not apply when the Department conducted tax audits with another agency and did not apply to "Type I" agencies within the Department that had tax administrative duties. See MCL 16.103 (a).

In so holding, the Court of Appeals did not address the notice mandate contained in section 5 of the Taxpayer Bill of Rights (MCL 205.5) regarding "a departmental action administering or enforcing a tax statute [including] … during an audit [and] both the administrative and judicial procedures for appealing a department decision." The Court of Appeals concluded that the statutorily required brochure advising taxpayers of their procedural rights was only designed to "help taxpayers," but was not required to complete or accurate. **Appx 1 at 6**. The Court of Appeals did not address whether the advice contained in the brochure could be amended retroactively after taxpayers had relied on the advice.

Regarding another section of the Taxpayer's Bill of Rights, the Michigan Supreme Court held in *Fradco Inc. v Dept of Treasury, supra,* that the Taxpayer Bill of Rights contained mandatory obligations that were independent and additional to the appellate provisions contained

in Section 22, MCL 205.22 and that an appeal period did not start until the Department satisfied the requirements of the Taxpayer Bill of Rights. *Id.* at 115.

II. THE COURT OF APPEAL'S OPINION ADDRESSES ISSUES OF FIRST IMPRESSION – MCR 7.305(B) (1), (2) AND (3).

This case presents several issues of first impression that have not been addressed by a Michigan court.

The first is whether the Taxpayer Bill of Rights applies whenever the Department interacts with taxpayers in the administration of a tax statute. Specifically, the case involves the implication of the Department's failure to follow MCL 205.5 which required the explanation of a taxpayer's appellate remedies regarding "a departmental action … administering a tax statute." No court has construed section 5. The Court of Appeals Opinion largely determined that section 5 is simply a courtesy with no legal import if the advice is erroneous.

A second issue is whether the Department is excepted from the obligations of the Taxpayer Bill of Rights when it operates concurrently with another agency in administering a tax law. No court has addressed this issue.

A third issue involves the proper forum for litigation of a film credit claim. The Department has in both written publications and in repeated legal positions taken before courts in Michigan adopted the position that the Michigan Court of Claims was the exclusive forum for appeals of film credit claims under the Michigan Business Tax Act. Defendants retroactively reversed their administrative position in this case. No court has, until the Court of Appeals decision, addressed the proper jurisdiction for film credit claims.

III. THE COURT OF APPEALS' OPINION ADDRESSES ISSUES OF SIGNIFICANT PUBLIC INTEREST AND THE CASE IS BY OR AGAINST A SUBDIVISION OF THE STATE - MCR 7.305(B)(2) - AND INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE – MCR 7.305(B)(3).

This case is against the Department and the Michigan Film Office.

The case presents the question of whether the Department, performing tasks that were *not* statutorily delegated to it but were instead delegated to another division within the Department (the Michigan Film Office) can avoid the requirements of the mandate of the Taxpayer Bill of Rights. A second question is whether the Department may retroactively change its published administrative position regarding appellate procedures after having a) published a brochure advising that MBT appeals were governed by the Revenue Act; b) after having taken the legal positon in Michigan and in federal courts that the forum for appeals of film credits lay exclusively with the Michigan Court of Claims; and, c) after having represented to the Court of Claims that jurisdiction for film credits resided exclusively with the Court of Claims. *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990); *International Home Foods Inc . v Department of Treas.*, 477 Mich 988; 725 NW2d 458 (2007); affirming the dissent in 268 Mich App 356; 708 NW2d 711 (2007) (permitting retroactive changes in position only pursuant to court decisions). And finally, whether the Department's selective reversal of its administrative position only with respect to Plantiff-Appellant violated the constitutional guarantee of equal treatment and uniform assessment. *Armco Steel Corp v Dept of Treas.*, 419 Mich 582; 358 NW2d 839 (1984).

IV. MCR 7.302(B)(5) THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS, CONFLICTS WITH DECISIONS OF THE MICHIGAN SUPREME COURT AND COURT OF APPEALS AND WILL CAUSE MATERIAL INJUSTICE.

The purpose of the Taxpayer Bill of Rights and the Revenue Act is to prevent "gotcha" tax administration via audits based on undisclosed or conflicting administrative positions. In this case, Defendants represented that the process for appeal resided in the Court of Claims. For over half a year, consistent with that representation, the Defendants rescinded multiple letters denying the credit and re-issuing the letters in 60 day increments to continue an audit of Plaintiff-Appellants. The Department affirmatively advised Plaintiffs in January, 2014 that a 60 day extension period would end on February 10, 2014 on which an appeal was required to be filed. During the interim, the Department scheduled a final meeting with Plaintiffs.

Plaintiff-Appellants filed an appeal on February 10, 2014. Defendants responded with Motions for Summary Disposition claiming that the Court of Claims had no jurisdiction, that there was no specific statutory procedure for appealing a Film Office decision, and that since there had been no evidentiary hearing Plaintiffs were required to have filed an appeal under the Michigan Court Rules within 21 days after the first letter of denial. The Defendants argued that their practice of rescinding and re-issuing deny letters in 60 day increments, while erroneous, could not confer jurisdiction. The Court of Claims agreed. The Circuit Court did not address the claims when it denied leave to appeal.

Concluding that the Taxpayer Bill of Rights and the Revenue Act did not apply, the Court of Appeals agreed with the Court of Claims that there was no statutory procedure for appealing a decision of Defendants and that the 21 day appeal period applied because no evidentiary hearing had been held, **Appx 1 at 6-7.** The Court of Appeals acknowledged that the departmental actions and explicit advice was erroneous but concluded that misleading appellate notice could

not be remedied if the remedy effectively extended jurisdiction. *Id*. at 7. The Court of Appeals decision is contrary to the Michigan Supreme Court's rationale in *Fradco, supra.,* which found that provisions of the Taxpayer Bill of Rights were co-extensive with the appeal filing periods and that the time for filing an appeal did not start until the notice pre-requisites under the Taxpayer Bill of Rights had first been met. *Fradco*, *supra.* at 118.

However, when Teddy 23 and MPC followed the Department's representations and appealed to the Court of Claims, the Department sought to dismiss the Complaint, claiming that the appeal should have been filed in Circuit Court within 21 days of the first denial in June 2013. The Court of Claims agreed and denied Teddy 23 and MPC a hearing. **Court of Appeal Appellants' Brief (hereafter "COA Brief") Exhibit 1.** In light of the Departments' change of position—that the jurisdiction was proper in the circuit court, Plaintiffs also filed a delayed application for leave in the Ingham Circuit Court before the Court of Claims rendered its decision, which was summarily denied without any explanation. **COA Brief Exhibits 2, 3.** Because of the Department's misrepresentations, retroactively changing its official positions, and because of the lower courts' erroneous decisions, Teddy 23 and MPC have been wrongfully denied a tax credit of $6.3 million, and have been deprived of the right to any judicial review of the denial. Thus, as set forth below, reversal is warranted.

STATEMENT OF FACTS

I. TAXPAYER BILL OF RIGHTS

In 1993, the Michigan Legislature enacted the Taxpayer's Bill of Rights, a series of amendments to the Revenue Act which were designed to ensure that taxpayers received notice and fair and a meaningful opportunity to resolve tax disputes. Among other revisions, the Legislature required section 5 that the Department set out the "taxpayer's protections and

recourses in regard to a departmental action administering or enforcing a tax statute, which specifically included departmental audits." MCL 205.5. The Department issued a brochure explaining taxpayers' rights in an audit, which it entitled, "Taxpayer Rights During an Audit: Working Together." **Appx 3**. As a premise to working together with taxpayers, the Department assured taxpayers that, "Treasury auditors are professionals, familiar with the application of Michigan tax law…While the audit is in progress, the auditor will answer any questions that may arise. …When the audit is finished, the auditor will explain the audit findings and the alternatives available to the taxpayer if the taxpayer disagrees with the audit results." The brochure invited taxpayers to "direct questions to the auditor who performs the audit."

In addition, a separate taxpayer handbook is also required to be prepared to provide taxpayers audit-specific guidance for any audit, whether conducted "by the department [or] agents of the department." MCL 205.4 (a) (b). Pursuant to this statutory mandate, the Department issued what it calls the *Taxpayer Rights Handbook*, which lists the Michigan Business Tax ("MBT"), and, without exception, instructed taxpayers that appellate recourse is to the Court of Claims. *Pls' Resp Brief*, p 13 & Ex 14; **COA Brief Exhibit 22**.

The Department and its Film Office took the legal position before courts in Michigan that the exclusive forum for the litigation of film credit claims was the Michigan Court of Claims. In *Sandy Frank Productions LLC v Mich Film Office*, 2012 WL 12752 (ED Mich, Jan 4, 2012) and in *Mich Film Coalition v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2012 (Docket No. 304000) (seeking to dismiss circuit court appeals on this same rationale) the Defendants rejected circuit court jurisdiction. **COA Brief Exhibit 4, p 3; COA Brief Exhibit 5; COA Brief Exhibits 6-12.** See *Pls' Resp Br*, p 2 & Ex 1;

Consistent with this legal position, Defendants have, until this case, litigated MBT film credit claims in the Michigan Court of Claims. **COA Brief Exhibits 4-12.**

II. FILM CREDITS UNDER THE MICHIGAN BUSINESS TAX ACT, MCL 208.1455

In 2008, in an effort to attract jobs and business to Michigan, the Michigan Legislature provided for a new credit in the MBT Act, MCL 208.1101 *et seq.* *Amended Complaint (hereafter "Am Compl,"* ¶24 (Court of Claims).[1] This legislation offered a qualifying film production company a refundable film credit against its MBT liability for "direct production expenditures" that occurred in the preproduction, development, production, and post-production of a film in Michigan. *Am Compl*, ¶24. See 2008 PA 77; MCL 208.1455 (also referred to as "Section 455"). [2]

A taxpayer had to apply for the credit and enter into a written agreement with the Department and the Department's Film Office (an agency existing within the Department of Treasury) memorializing the amount of the tax credit.[3] *Am Compl*, ¶¶8, 28-29. Once the application was approved, the taxpayer could request a Post-production Certificate of Completion (the "Certificate") from the Film Office by submitting a mandatory independent audit verifying its activities. *Am Compl*, ¶¶29-31. The Department would conduct the audit

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[1] Teddy 23 and MPC filed their original Complaint in the Court of Claims on February 10, 2014. On March 24, 2014, Teddy 23 and MPC filed their First Amended Complaint, incorporating by reference the exhibits that were attached to the original Complaint. Hereinafter, the Amended Complaint will be cited as "*Am Compl*" and all exhibits thereto as, e.g., "Ex A" or "Exs A, B."

[2] In 2011, the Legislature amended the MBT Act to eliminate elements of the film credit and the reporting requirements thereunder. See 2011 PA 39. As discussed more fully *infra*, the matter before this Court involves a credit under the legislation as it existed prior to these amendments.

[3] The Film Office is a State of Michigan administrative agency created under the Michigan Strategic Fund. *Am Compl*, ¶4. The Strategic Fund is an autonomous entity within the Department of Treasury. *Film Office's Motion for Summary Disposition*, p 9, n 6 (Court of Claims).

necessary to make the determination of the amount of the credit to be awarded. *Am Compl*, ¶7. In no instance generally and particularly in this case did any analyst from the Film Office request documents, review documents or interview any person associated with the production of Teddy 23. As a result of the Department's audit, the Film Office would issue a tax credit in the amount determined by the Department and the Department would issue a credit or a refund. *Am Compl*, ¶31.

III. TEDDY 23'S AGREEMENT WITH THE FILM OFFICE AND THE DEPARTMENT OF TREASURY

Teddy 23 was organized in Michigan as a film production company on March 25, 2010. *Am Compl*, ¶1. In June 2010, it contracted with MPC to secure financing for a portion of the production of "Scar 23," a science fiction film that was to become the first CGI film in Michigan. *Am Compl*, ¶¶51, 54, 56 & Exs B, C, F. As security for the financing, MPC received the right to receive a portion of Teddy 23's film credit and became a member of Teddy 23 entitled to act on its behalf with regard to film credit matters. *Am Compl*, ¶3.

On June 11, 2010, Teddy 23 filed a Film Production Incentive Application and a proposed Agreement. *Am Compl*, ¶57 & Ex B. The application was reviewed by the Department, which issued a "Treasurer's Review Checklist for Concurrence." *Am Compl*, ¶¶58, 62 & Ex C. See **COA Brief Exhibit 13.** On July 19, 2010 and again on December 28, 2010, the Department and the Department's Film Office approved Teddy 23's request for allowable expenditures from the original amount of $15,170,186, resulting in an estimated tax credit of $6,349,529. *Am Compl*, ¶86 & Ex G. See **COA Brief Exhibits 14 and 15.**

IV. TEDDY 23'S REQUEST FOR THE POSTPRODUCTION FILM CERTIFICATE

In early 2011, as the due date for its secured loan drew closer, MPC requested that Teddy 23 seek the credit for the film expenses that had been incurred in Michigan. *Am Compl*, ¶107.

Teddy 23 confirmed with the Film Office that an early application approval would not result in a denial of film credit for expenditures incurred to date, but only preclude the ability to obtain further credits for subsequent expenditures. *Am Compl*, ¶108. In May 2011, Teddy 23 requested a Certificate authorizing a film credit for the incurred expenses. *Am Compl*, ¶122 & Ex H. See **COA Brief Exhibit 16.**

Along with its request for the Certificate, Teddy 23 submitted a statutorily-required "independent audit," which was conducted by Ms. Patti Kahn of Kahn and Co., PLC, a Michigan licensed CPA. *Am Compl*, ¶112. Ms. Kahn concluded that the bulk of the expenses were qualified "direct production expenditures" under the MBT Act, that the expenses had been incurred in Michigan, and that the Certificate should therefore be issued. *Am Compl*, ¶121 & Ex I. Her audit included a fraud risk assessment and an assessment as to whether there existed any material misstatements on Teddy 23's financial statements. *Am Compl*, ¶113 & Ex I. She reached her conclusions after interviewing Teddy 23's principals and personally reviewing operating agreements, minutes of meetings, and filings and corporate records for numerous third-party vendors. *Am Compl*, ¶¶114-15 & Ex I. Ms. Sarah Clark-Pierson, a Department Investigator, directed Ms. Kahn not to extend the audit to third-party vendors. *Am Compl*, ¶117 & Ex I. Ms. Kahn determined that no material misstatements were made and concluded that $10,737,904 of qualified expenditures had occurred in Michigan. *Am Compl*, ¶121 & Ex I. These qualified expenditures resulted in a credit under the film credit formula of $6.3 million.

V. THE DEPARTMENT OF TREASURY'S AND THE FILM OFFICE'S DENIAL OF THE CERTIFICATE

For two years, from June 2011 to June 2013, the Department audited Plaintiff-Appellants' Michigan investments to determine whether to issue the Certificate authorizing the credit. *Am Compl*, ¶125-29. During this two-year period, the Department did not request any

additional information or documents from Teddy 23 or MPC. *Am Compl*, ¶¶125-29. On June 20, 2013, the Department's Film Office issued Teddy 23 a letter ("the first denial letter") abruptly denying the Certificate. *Am Compl*, ¶131 & Ex A. See 06/20/13 Letter, **COA Brief Exhibit 17.** The letter failed to provide any explanation for the denial and stated simply that "any rights of appeal" began with the date of the notice.[4] *Am Compl*, ¶¶131-33 & Ex A; **COA Brief Exhibit 17.** The denial was based entirely on Department Investigator Clark-Pierson's audit, which was summarized in a memorandum (disclosed later) in which Investigator Clark-Pierson concluded that the credit should be denied because Teddy 23's principals "acted in concert to substantially misstate expenditures." *Am Compl*, ¶134 & Ex J. See **COA Brief Exhibit 18.** Despite telling Ms. Kahn *not* to review contracts with the third-party vendors, Investigator Clark-Pierson stated:

> The independent auditor is Kahn and Company, PLC. Its independence and methods for certification are generally satisfactory. However, in this instance, we find that the major contract at the core of this production was not tested for completion of performance. We recognized that is not normally the role of the independent auditor to test a vendor's account in detail. However because the Production Company and Maxsar Digital Studios (the computer generated imagery "CGI" vendor, hereafter 'Maxsar') are related parties, Treasury made further inquiries into the contract with Maxsar. Based on our inquiries, we could not accept or rely upon the independent auditor's report. [*Am Compl*, ¶135 & Ex J; **COA Brief Exhibit 18.**]

On August 16, 2013, fifty-seven days after the first denial letter was issued, the Department's Film Office sent a new letter to Teddy 23 ("the second denial letter"), which rescinded the first denial letter, reissued a new denial of the Certificate, and included an allegation of an "intentional submission of information that appears to be false and fraudulent" as

[4] The Department's Film Office did not provide MPC a copy of this letter until July 18, 2013. *Am Compl*, ¶133.

justification for the denial. *Am Compl*, ¶138. The second denial letter likewise stated that "any right of appeal" began with the date of the notice. *Am Compl*, ¶138.

Plaintiff MPC, at its own expense, hired Ms. Michelle McHale, a certified fraud examiner ("CFE") from the national accounting firm of Plante Moran to respond to Investigator Clark-Pierson's allegation of fraud. *Am Compl*, ¶141 & Ex K. Ms. McHale reviewed Ms. Clark-Pierson's audit and concluded the following in her own written report, which was provided to the Department:

> Our review of Treasury's analysis, as documented in its memorandum, reveals no evidence of the omission of specific items where similar items were included, the concealment of bank accounts or other assets, the covering up of sources of receipts, or any other affirmative evidence of fraud. It not only lacks a finding of "clear and convincing evidence" of fraud, but is completely lacking any evidence of fraud or fraudulent intent whatsoever. Instead, it relies on speculation, incorrect assertions, Treasury's inability to verify the source of funds corresponding with the claimed expenses, and based on its inability to evaluate the substantive pre-production content produced as a result of those expenditures. [*Am Compl*, ¶142 & Ex K.]

Two months later, on October 14, 2013, fifty-nine days after the August 16, 2013 denial letter was issued, at Investigator Clark-Pierson's recommendation the Department's Film Office rescinded its second denial letter and reissued a denial of the Certificate ("the third denial letter"). *Am Compl*, ¶144 & Ex A. See 10/14/13 Letter, **COA Brief Exhibit 17.** As with the August letter, the third denial letter included an allegation of an "intentional submission of information that appears to be false and fraudulent" and indicated that "any right of appeal" began with the date of the letter. *Am Compl*, ¶144 & Ex A; **COA Brief Exhibit 17.** Discussions continued with Department Investigator Clark-Pierson and Plaintiff MPC, which included the issue of venue in the event Teddy 23 and MPC wished to challenge the denial. *Plaintiffs' Brief*

in Opposition to Film Office's Motion for Summary Disposition, p 3 (Court of Claims).[5] On December 11, 2013, the Department's Film Office again issued a letter to Teddy 23 ("the fourth denial letter") rescinding the prior letter and reissuing the denial. *Am Compl*, ¶144 & Ex A. See 12/11/13 Letter, **COA Brief Exhibit 17.** As before, the fourth denial letter stated that "any right of appeal" began with the date of the letter. *Am Compl*, ¶144 & Ex A; **COA Brief Exhibit 17.**

On January 14, 2014, 34 days after its fourth denial letter, the Department (not the Film Office) advised Teddy 23 both orally and in writing that the repeated process of rescinding and reissuing the denial letter in 60-day increments reflected an "extension" of an "appeal period" during which they could challenge the denial of the Certificate. *Pls' Resp Brief*, p 3 & Ex 2. See 01/14/14 Correspondence from Film Office, **COA Brief Exhibit 19.** The Department further advised Teddy 23 that the appeal period expired on February 10, 2014, based on "the 60-day period" and that, if there was anything they wanted her to review she would need to review it "in advance of that last week of the appeal period." *Pls' Resp Brief*, p 3 & Ex 2; **COA Brief Exhibit 19**. Relying on this guidance, Teddy 23 prepared additional documents and materials to present to the Film Office. *Pls' Resp Brief*, pp 3-4 & Exs 3, 4. Department Investigator Clark-Pierson coordinated a meeting among the parties at the Film Office headquarters in Lansing. *Pls' Resp Brief*, pp 3-4 & Exs 3, 4.

VI. DISPOSITION IN THE LOWER COURTS

On February 10, 2014, just over a week after their meeting with the Department and its Film Office, Teddy 23 filed its Complaint in the Court of Claims. In response, the Department

[5] Hereinafter, this will be cited as "*Pls' Resp Brief*" and all exhibits thereto as, e.g., "Ex 1", "Ex 2." Plaintiffs filed their Response in Opposition to the Film Office's Motion for Summary Disposition in the Court of Claims on May 19, 2014. Plaintiffs also filed a Response in Opposition to the Department of Treasury's Motion for Summary Disposition, which contains essentially the same information as the response brief cited herein.

and its Film Office filed separate motions for summary disposition, claiming for the first time -- and contrary to their public position, their discussions with MPC, and their entire course of conduct with MPC regarding the extended audit -- that Teddy 23's Complaint should have been filed as an *appeal to the circuit court* per MCR 7.104 and MCR 7.105 within *21 days* of the denial of the Certificate, a period that would have *begun* on June 20, 2013, and would have expired even before the Department's second denial letter was issued on August 16, 2013. Defendants argued that the Court of Claims lacked subject matter jurisdiction because the decision to deny the Certificate was made by the Department's Film Office, not the Department itself, and thus did not trigger Court of Claims jurisdiction under Section 22 of the Michigan Revenue Act, MCL 205.22. See *Film Office Motion for Summary Disposition*, pp 8-9; *Department's Motion for Summary Disposition*, pp 13-15.

Teddy 23 and MPC opposed the motions, arguing that the Department conducted the audit that gave rise to the denial of the Certificate, that the Department made all decisions leading up to the denial, and that the filing of the Complaint in the Court of Claims was consistent with the Defendant's long-established interpretation that exclusive jurisdiction for a credit under the MBT Act was in the Court of Claims. Plaintiffs argued to the Court of Claims that the Department's published guidance directing taxpayers to the Court of Claims and Defendants repeated and uniform representation to courts in Michigan precluded the Defendant's claims as a matter of due process. *Plaintiffs' Response in Opposition to Department's Motion for Summary Disposition. Pp 11-17.* Both Defendants argued that it was not bound by its prior representations to courts, by its publication of erroneous appellate advice or by the explicit misrepresentation by its employee. *Film Office Reply Brief* pp 5-7; *Department's Reply Brief* pp 3-7.

While waiting for the Court of Claims' decision on the jurisdictional issue, MPC and Teddy 23 realized that the Court of Claims would not render a decision before the expiration of the 6-month deadline in MCR 7.105(G)(2) for filing a delayed application for leave to appeal in the circuit court (where Defendants argued the claim should have been brought) an initiated an action in Ingham Circuit Court. In response, the Department, acknowledging the unique nature of the issue in the Court of Claims, approached Teddy 23 and MPC and requested that they agree to hold the Circuit Court matter in abeyance pending the Court of Claims decision on the jurisdictional issue. See **COA Brief Exhibit 20.** The Department prepared a Stipulation for Abeyance, and on June 17, 2014, the Department filed the Stipulation in the Circuit Court. Despite this Stipulation, the Circuit Court -- without any explanation or reason given -- denied the delayed application on June 17, 2014. **COA Brief Exhibit 2.** Three days later, on June 20, 2014, the Circuit Court inexplicably granted and issued the Stipulated Order of Abeyance. See **COA Brief Exhibit 21.** The Department refused to invoke the Stipulation or extend its terms to protect Plaintiffs' interests pending the Circuit Court decision. On July 29, 2014, the Circuit Court then denied Teddy 23 and MPC's Motion for Reconsideration, again without an explanation or reason. **COA Brief Exhibit 3.**

On August 8, 2014, the Court of Claims granted the Department's Motion for Summary Disposition, finding that the Revenue Act, MCL 205.22(1), permitted an appeal to the Court of Claims from "an assessment, decision, or order of the department," but that no "decision" or order of the Department was made -- such decision or order was made by the Department's Film Office. **COA Brief Exhibit 1, p 8.** The Court of Claims rejected the argument that an appeal of the Department's actions (however delegated within the Department) was reviewable per se in the Court of Claims, finding instead that review of the actions of the Department's Film Office

was, under the Revised Judicature Act, restricted to administrative appeal remedies in circuit court. **COA Brief Exhibit 1, pp 8-9.** The Court of Claims did not address the Department's audit, the Department's summary report, or the Department's near exclusive meetings with Teddy 23 and MPC (without the Film Office present); nor did it address the other film credit cases litigated in the Court of Claims. See **COA Brief Exhibit 1; COA Brief Exhibits 4-12.**

VII. THE COURT OF APPEALS' OPINION

Plaintiffs appealed both the Court of Claims and Circuit Court decisions. The appeals were consolidated by order of the Court of Appeals.

Before the Michigan Court of Appeals, the Department argued that the general provisions of the Revenue Act including the entire Taxpayer Bill of Rights was not applicable to departmental actions in enforcing the film credit statute. Dep't COA Brief, p 26. The Department did not dispute that the Handbook listed the MBT and, without exception, instructed that appellate recourse was in the Court of Claims for claims under the MBT Act. **COA Brief Exhibit 22**. The Department contended instead that the Handbook did not mention specific credits with the MBT Act, "The Handbook does not mention film credits or how to appeal Film Office decisions." *Id.*

The Department also did not dispute that it had consistently represented to state and federal courts in Michigan that the Michigan Court of Claims was the exclusive venue for litigation of film credit claims. Instead the Department stated, that it "misinterpreted" the law in other cases before the Court of Claims. Dep't COA Brief, p 25 (stating that "counsel for Treasury . . . *may have previously* misinterpreted the law advocat[ing] that the Court of Claims had jurisdiction"). Both Defendants asserted that their past positions in the Department's publications and before courts was irrelevant because, as administrative agencies, they were not

bound by their own erroneous interpretation and their mistake could not operate to "extend" a jurisdictional provision.

In its December 15, 2015 unpublished opinion, the Court of Appeals concluded that because there was no statutory procedure for appealing a decision from Defendant Film Office and no evidentiary hearing had been held, jurisdiction for an appeal would have been in circuit court under the 21-day requirement of the Michigan Court Rules. **Appx 1 at 6.**

The Court of Appeals acknowledged that the audit required to be conducted (MCL 208.1455 (5)) before issuance of post-production certificate was conducted not by the Film Office, but by the Department's Investigator Clark-Pierson. **Appx 1 at 3**. The Court of Appeals further agreed that Clark-Pierson had provided explicit written advice that the appeal period was a "60-day period" and had provided a specific final appeal date of February 10, 2014. **Appx 1 at 3.** However the Court held that subject matter jurisdiction could not be conferred by estoppel and it was not error for the circuit court to have rejected an estoppel claim. **Appx 1 at 7.** The Court of Appeals dismissed the relevance of the Defendants' other film credit cases that were litigated in the Court of Claims, curiously noting, "[A]lthough plaintiffs provided numerous copies of filings of film tax credit cases from the Court of Claims, nothing suggests that defendants provided these fillings to plaintiffs, as opposed to plaintiff having obtained them through their own research." **Appx 1 at 7.**

As well, the Court of Appeals concluded that the circuit court did not abuse its discretion in failing to consider the Department's misrepresentation to Plaintiffs that the Court of Claims had jurisdiction over the appeal. **Appx 1 at 6.** The Court found no significance to the "Taxpayer Rights Handbook," asserting that the handbook, quoting from Department, was "to help taxpayers … not take the place of law." **Appx 1 at 6.** The Court did not address Clark-Pierson's

erroneous appellate advice regarding the appeal deadline except to conclude that it was erroneous. **Appx 1 at 6.** Though the circuit court provided no analysis in its denial of the application for leave, the Court of Appeals noted that the circuit court denied Plaintiffs' motion for reconsideration quoting the standard in the Michigan Court Rules and thereby indicating, according to the Court of Appeals, that the circuit court was familiar with the issues. **Appx 1 at 7.**

Finally, the Court of Appeals concluded that while the Revenue Act applied to the Department's administration of taxes, it would not apply to a division of the Department that administered taxes, the Film Office, and would not apply to the Department if it did not involve an assessment. **Appx 1 at 4-5.** The Court of Appeals concluded that the "substantive decision making" was made by the Film Office, though it did not provide the facts on which this disputed conclusion was based. **Appx 1 at 5.**

Plaintiffs filed a motion for reconsideration on January 5, 2016 contesting the Court of Appeals erroneous determination that the Department had made no decision that was subject to appeal, and, the Court of Appeals' failure to address advice and notice requirements mandated in MCL 205.5 regarding a "departmental action," though the Court of Appeals' decision detailed these actions, i.e. the department's audit, the department's written audit determination, the Department's requests for information, scheduling meetings, and appellate direction.

On February 12, 2016, the Court of Appeals denied the motion without comment. Plaintiffs now requests leave to appeal to the Michigan Supreme Court.

DISCUSSION

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT MCL 205.5 OF THE TAXPAYER BILL OF RIGHTS WAS NOT APPLICABLE TO DEPARTMENTAL ACTIONS ADMINISTERING THE FILM CREDIT STATUTE OF THE MBT ACT AND THAT THE NOTICE OF APPELLATE

PROCEDURES REQUIRED IN MCL 205.5 WAS NOT THE PROCESS DUE TAXPAYER WAS INSTEAD A COURTESY THAT NEED NOT BE COMPLETE OR ACCURATE.

A. Standard of Review.

Courts review de novo both questions of statutory construction and the lower court's decision on a motion for summary disposition. *Briggs, supra,* 485 Mich at 75; *Moshier v Whitewater Twp,* 277 Mich App 403, 407; 745 NW2d 523 (2007); *Walker v Johnson & Johnson Vision Prods*, 217 Mich App 705, 708; 552 NW2d 679 (1996). Summary disposition may be granted under MCR 2.116(C)(10) where there is no genuine issue of material fact and the moving party proves that it is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

B. Taxpayer Bill of Rights and Section 5.

"Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards to satisfy the commands of the Due Process Clause." *McKesson Crop v Div of Alcoholic Beverages and Tobacco*, 496 US 18; 36, 110 Sct 2238 (1990). Under the Michigan or Federal constitutions, "notice," must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them a fair opportunity to challenge the accuracy and legal validity of their tax obligations." *McKesson* at 39; *Mullane v Central Hanover Bank & Trust Co*., 339 US 306, 314; 70 S Ct. 652 (1950); US Const Am XIV; Const 1963, art 1, §17.

Within this constitutional framework, the Michigan Legislature enacted the Taxpayer's Bill of Rights in 1993. The amendments to the Revenue Act which were designed to ensure that

taxpayers received notice and fair and a meaningful opportunity to resolve tax disputes.[6] The language, detail and number of these obligations underscore the Michigan Supreme Court's conclusion with another provision of the Taxpayer Bill of Rights, the obligations are not mere courtesies. *Fradco, supra.* at 114. They are pre-conditions that must be met before the Department takes any departmental action in administering a tax. *Fradco, supra.* at 117-118 (stating that the obligations in the Taxpayer Bill of Rights apply with "equal force" to other notice requirements; and, "[i]n both force and effect, this obligation applies to the department."

Among the Bill of Rights provisions, the Legislature has required that,

> The department shall prepare a brochure that lists and explains in simple and nontechnical terms, a taxpayer's protections and recourses in regard to a departmental action administering or enforcing a tax statute including…(a) A taxpayer's protections and the department's obligations during an audit. (b) Both the administrative and judicial procedures for appealing a departmental decision. MCL 205.5.

The Department dutifully prepared a brochure explaining taxpayers' rights in an audit, which it entitled, "Taxpayer Rights During an Audit: Working Together." **Appx 3**. As a premise to working together with taxpayers, the Department assured taxpayers that:

- "Treasury auditors are professionals, familiar with the application of Michigan tax law….The auditor assigned will conduct a fair and impartial examination of the taxpayer's records. While the audit is in progress, the auditor will answer any questions that may arise."
- "When the audit is finished, the auditor will explain the audit findings and the alternatives available to the taxpayer if the taxpayer disagrees with the audit results."
- "The taxpayer should direct questions to the auditor who performs the audit."

[6] Since the Taxpayer Bill of Rights was first enacted, the Legislature has continued to mandate, with increasing detail, the Department's obligations in its interactions with taxpayers. See 2014 PA 240; 2014 PA 35;2014 PA 277; 2006 PA 5; 2006 PA 6; 2006 PA 12; 2006 PA 11.

A separate taxpayer handbook was also required to be prepared to provide taxpayers with a handbook of the audit procedures and communications with taxpayers during an audit, whether conducted "by the department [or] agents of the department." MCL 205.4 (a) (b).

The Department's overarching obligations, contained in sections 1 through 19 of the Revenue Act is separate from and additional to other provisions of the Revenue Act , i.e. the Department's issuance of intents to assess, informal conferences and final assessments for "Revenue Act" taxes. *Fradco, supra.* 116-118; MCL 205.20 (stating that the procedure "provided in sections 21 to 30" of the Revenue Act); MCL 205.21 (1) (2). Pursuant to this statutory mandate, the Department published what it calls the *Taxpayer Rights Handbook*, which lists the taxes governed by the brochure. See *Pls' Resp Brief*, p 13 & Ex 14. See **COA Brief Exhibit 22.** The *Handbook* lists the Michigan Business Tax ("MBT"), and, without qualification, instructs taxpayers that appellate recourse is to the Court of Claims. *Pls' Resp Brief*, p 13 & Ex 14; **COA Brief Exhibit 22.**

Though not addressed by the Court of Appeals, the Department claimed on appeal that the handbook's advice that MBT claims must be litigated in the Court of Claims did not involve MBT film credit claims and further that its consistent representation to courts that the Michigan Court of Claims was the exclusive forum to litigate film credit claims was erroneous. The Court of Appeals concluded that the handbook and other guidance mandated by the Taxpayer Bill of Rights had no legal significance. The Court of Appeals did not address MCL 205.5. The Court of Appeals instead concluded that the departmental actions including the audit were not subject to the Revenue Act or any other statutory restrictions.

C. Statutory Construction.

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs, supra*, 485 Mich at 76. "The first step is to review the language of the statute." *SMK, supra,* 298 Mich App at 304. "The words of the statute are the most reliable evidence of its intent. *Sun Valley Foods Co. v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Courts consider "the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *Sun Valley, supra.* The fair and natural import of the terms employed by the Legislature are considered in view of the subject matter of the law they govern. *LaFarge Midwest, Inc. v Detroit,* 290 Mich App 240, 246; 801 NW2d 629 (2010). Courts do not replace or add terms that the Legislature could have used but did not. *People v Kern,* 288 Mich 513, 522; 794 NW2d 362 (2010). For the same reason, courts also avoid a construction that would render any part of the statute surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*., 468 Mich 459, 467; 663 NW2d 447 (2003). Instead, courts presume that the Legislature knows of and legislates in harmony with existing laws, that the Legislature is knowledgeable about the rules of grammar and that the Legislature understands the rules of statutory construction. *Lafarge Midwest Inc., supra.* at 250. With these presumptions, presumptions that focus interpretation of the Legislature's choice of language and grammar, courts presume the obvious: that the Legislature intended the meaning expressed in the unambiguous language of the statute and enforced the statute as written. *Lansing Mayor v Pub Serv Comm.*, 470 Mich 154, 157; 680 NW2d 840 (2004). A finding of ambiguity, by contrast, is "a finding of last resort," reached only after "all conventional means of [ ] interpretation have been applied and found wanting." *Lansing Mayor, supra* at 165, in part, quoting *Klapp, supra* at 474.

D. Section 5 is Unambiguous and Requires Full Disclosure of Appellate Remedies for Any "Departmental Action."

MCL 205.5 requires that Department explain "a taxpayer's protections and recourses in regard to a departmental action administering or enforcing a tax statute," stating in significant part as follows.

> The department shall prepare a brochure that lists and explains in simple and nontechnical terms, a taxpayer's protections and recourses in regard to a departmental action administering or enforcing a tax statute including…(a) A taxpayer's protections and the department's obligations during an audit. (b) Both the administrative and judicial procedures for appealing a departmental decision. MCL 205.5.

Section 5 is general provision of the Revenue Act that is not limited to the tax appeal procedures mandated in sections 21 through 30 of the Revenue Act. See MCL 205.20. It applies whenever "a *departmental* action … administering a tax statute" occurs. The term "departmental" refers to the Department of Treasury. MCL 205.1. There is no limitation as to particular divisions within the Department. The only limitation is whether the Department is administering or enforcing a tax statute. Any division or agency of the department that *administers* a tax statute is subject to Taxpayer Bill of Rights.

The phrase "departmental *action*" is general. The Legislature did not reference a specific section of the Revenue Act or describe specific actions (i.e. assessment, informal conference, intent to assess). The term "action" in section 5 specifically includes any audit that meets the Department's general audit authorization in section 3 of the Revenue Act, MCL 205.3; that is the "examin[ation of] the books, records and papers touching the matter at issue," or, requiring the "produc[tion of] any books, papers, records, or memoranda in any investigation." MCL 205.3 (a). The Court of Appeal's description of Investigator Clark-Pierson's activity plainly fails

within the general description of an audit. **Appx 1 at 3** ("reviewed Teddy 23's expenditures and concluded…") .

The Court of Appeals rejected this literal construction. Instead, the Court of Appeals rationalized that because the film credit statute referenced both the Department and the Film Office, an agency within the Department, the provisions of the Revenue Act, particularly the Taxpayer Bill of Rights, did not apply to the Film Office. **Appx 1 at 5**. The Court of Appeals then found, without any basis in fact, that because the Department and the Film Office were organizationally independent, they *in fact operated independently.* That conclusion is plainly contradicted by the Court of Appeals own summary of the Department Investigators activity. MCL 205.5 mandated that the Department provide specific explanations of the "taxpayer's protections and recourses in regard to a departmental action," which in this case was the specific forum for litigation of film credit claims.

The Taxpayer Bill of Rights did not permit the Department to do what it did: publish information about MBT litigation directing taxpayers to the Court of Claims, embark on advocacy in Michigan courts asserting that the exclusive forum for litigation for film credit claims was the Michigan Court of Claims, provide affirmative misrepresentations to the taxpayer as to when to file, and then assert an entirely contrary appellate path applied to Plaintiffs.

E. A Violation of Section 5 is a Procedural Due Process Violation Which Can Only be Remedied by Allowing an Appeal.

As the Michigan Supreme Court recognized in *Fradco, supra*. a failure to attend to the requirements of the Taxpayer Bill of Rights simply reverses the resulting procedural dismissal. In *Fradco,* the Department determined not to follow the mandate of section 8, MCL 205.8, which required that final assessments be sent to the taxpayer's representative. The Department viewed section 8 as a courtesy. When *Fradco's* tax representative did not receive a copy of the final

assessment in order to timely appeal, the Department sought to dismiss the appeal, claiming the Tribunal lacked jurisdiction. In concluding that the Taxpayer Bill of Rights applied with "equal force" as the procedural specific sections of the Revenue Act, the Michigan Supreme Court concluded:

> … we further conclude that satisfaction of both notice requirements is required before issuance of the assessment is deemed to have occurred, starting the appeal period. Because the department delayed issuing the notice of assessment to the taxpayers' representatives … the running of the appeal periods were also delayed. The taxpayer's appeals were therefore timely and the Tax Tribunal retained jurisdiction. … [T]he department's statutory obligation to notify a taxpayer's official representative [Taxpayer Bill of Rights, MCL 205.8] is …a prerequisite…[T]he appeal period begins when the department complies with MCL 205.28 (1) (a) by giving the taxpayer notice of the final assessment through personal service or certified mail and MCL 205.8 by sending a copy of the notice of the final assessment to the representative's address provided by the taxpayer in its written request. *Fradco, supra.* at 118-119.

The relief given in *Fradco* is no different than in any other violation of procedural due process. The failure to provide statutorily mandated notice is treated no differently than providing erroneous notice. *Alan v Wayne Co*, 388 Mich 210, 352; 200 NW2d 628 (1972); *Latin Express Serv, Inc v Fla Dep't of Revenue*, 660 So2d 1059, 1060 (Fla Dist Ct App 1995); *Trussell v Decker*, 147 Mich App 312, 323-324; 382 NW2d 778 (1985); *Mullane v Cent Hanover Bank & Trust Co*, 339 US 306, 313 (1950); Const 1963, art 1, §17; US Const, Am XIV. See also *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014).

Contrary to the Court of Appeals Opinion, the correction of a procedural due process violation does not "extend jurisdiction" or impermissibly confer subject-matter jurisdiction due to the erroneous departmental actions. **Appx 1 at 7.** It is not an estoppel claim or application of equitable principles. It is the constitutional pre-requisite that must be met before a taxpayer is deprived of property. *McKesson Crop v Div of Alcoholic Beverages and Tobacco, supra.;*US Const Am XIV; Const 1963, art 1, §17. When the pre-requisites have not been met, any

administrative action to deprive a taxpayer of property is re-started or cancelled. The Supreme Court should grant Plaintiffs' application for leave to appeal.

II. THE COURT OF APPEALS ERRED IN PERMITTING THE DEPARTMENT TO RETROACTIVELY CHANGE A PUBLISHED LEGAL POSITION THAT HAD BEEN TAKEN IN REPEATED REPRESENTATIONS TO MICHIGAN COURTS THAT THE JURISDICTION FOR MBT FILM CREDIT CLAIMS RESIDED IN THE COURT OF CLAIMS.

A. Standard of Review.

As with questions of statutory construction or a lower court's decision on a motion for summary disposition, constitutional issues are also reviewed de novo. *Briggs, supra; Wayne Co. v Hathcock,* 471 Mich 445; 684 NW2d 765 (2004). Whether a new administrative position should be applied retroactively presents a question of law that is also reviewed de novo. *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990); *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008).

B. Prospective Application of an Administrative Position.

While administrative agencies have interpretative authority and may reverse a prior interpretation of a statute, the new interpretation applies prospectively. *In re D'Amico, supra* at 562. The new interpretation is applied prospectively for some of the same reasons an agency's longstanding interpretation of statutes is entitled to greater weight: the public may have reasonably relied on the interpretation. *Id.* at 559-561.

The purpose underlying the Legislature's requirement in the Taxpayer Bill of Rights that the Department publish an explanation of the "taxpayer's protections and recourses in regard to a departmental action" was exactly to require a level of transparency on which the public could rely to determine their rights. The Department was not given a free pass to work out administrative theories internally or try them out in court. It was required to interpret the law, place its interpretation on paper and publish it for the public's use and protection.

Section 5 of the Revenue Act provides more than notice, it prevents arbitrary enforcement of the law. It ensures that the public is given consistent guidance and not made a victim of disparite treatment. When the Department changed its interpretation of law, the Department was required to apply that new change prospectively and publicly. *In re D'Amico Estate, supra.*

Plainly the Department changed its interpretation regarding the appropriate forum for litigation of film credit claims. Its change was required to be published *before* it was binding prospectively. Without those protections, the new interpretation cannot be applied to Plaintiffs. The Departments new theory was prosecuted contrary to law and violated Plaintiffs rights to procedural due process.

C. Law of Judicial Estoppel.

The benefit of publishing its interpretation extends beyond taxpayers relying on the guidance, it extends to courts. Agency interpretations of statutes are entitled to respectful consideration but are not binding on courts and cannot conflict with the governing statutes. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008). On the other hand, administrative agencies do not have license to switch legal positions in court cases for some of the same reasons, they must publish their interpretations and enforce the law uniformly.

Judicial estoppel precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation and protects the integrity of the judicial and administrative processes. *Ford Motor Co v Pub Serv Comm*, 221 Mich App 370, 382-83; 562 NW2d 224 (1997). A party that has unequivocally and successfully set out a position in prior proceedings is estopped from prosecuting an inconsistent position. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 672; 760 NW2d 565 (2008). The salutary feature

of the doctrine is that it prevents parties -- here the Department -- from playing "fast and loose" with the legal system. *Paschke v Retool Indus,* 445 Mich 502, 509-10; 519 NW2d 441 (1941).

In *Sandy Frank Productions LLC v Mich Film Office*, 2012 WL 12752 (ED Mich, Jan 4, 2012), both the Film Office and Department argued that they were not subject to the jurisdiction of the federal court because an adequate remedy existed under state law, namely, in the Court of Claims. See *Pls' Resp Br,* p 2 & Ex 1; **COA Brief Exhibit 4, p 2, n 2.** In *Sandy Frank Productions*, the Department's Film Office argued the following in its Motion to Dismiss:

> The film tax credit, if granted, is a credit against the Michigan Business Tax. MCL 208.1455 (5), (8). Resolution of state tax issues is within the jurisdiction of the Michigan Department of Treasury and State Court of Claims. MCL 205.1. MCL 208.1513. MCL 20[5].21. MCL 20[5].22.
>
> The Department of Treasury is the agency in the State of Michigan responsible for the collection of taxes, including the Michigan Business Tax (MBT) and determination of any credit set off against the MBT and the administrative process used. MCL 205.1. MCL 208.1513. MCL 20[5].21. MCL 20[5].22. [**COA Brief Exhibit 4, p 2, n 3.**]

In fact -- in direct contradiction to its position in this case -- the Film Office opposed Plaintiff Sandy Frank Productions' claim that the matter could be transferred to the Oakland County Circuit Court, "Sandy Frank further speculates about various courts which may have jurisdiction over the film tax credit issue." **COA Brief Exhibit 4, p 3.** Defendants have sought to dismiss circuit court appeals on this same basis. See, e.g., *Mich Film Coalition v Dep't of Treasury,* unpublished opinion per curiam of the Court of Appeals, issued August 21, 2012 (Docket No. 304000), **COA Brief Exhibit 5**.

The Department has not struggled with the statutory directive. In virtually every other case involving litigation over the MBT Act film credit, the Department has accepted that jurisdiction resided in the Court of Claims. Based on their search of the Court of Claims online docket records, Plaintiffs have located eight other film credit cases brought in the Court of

Claims from 2010 through 2013. See *Pls' Resp Br*, p 2 & Exs 1, 5-12; **COA Brief Exhibits 4-12.** In *not one* of those cases did Defendants seek to dismiss the complaint filed in the Court of Claims on jurisdictional grounds. In *not one* of those cases did they contest the applicability of MCL 205.22 or MCL 208.1513, directing that appeals be brought in the Court of Claims under MCL 205.22. To the contrary, the Department has proceeded under Court of Claims jurisdiction until a settlement was reached with the claimants.[7] See, e.g., *Pls' Resp Br*, p 12 & Ex 6; **COA Brief Exhibit 7 (**Consent Agreement amounted to a $900,000 additional refund to the film credit claimant).

Contrary to the Court of Appeals dismissal of the Department's position in other courts, the position taken by Defendants in prior litigation is entirely relevant. It underscored the operating interpretation of venue. Nowhere in the *Handbook* has the Department set out the obscure appeal mechanism that the Defendants have advocated in their Motions for Summary Disposition in this case. See *Pls' Resp Br*, 13 & Ex 14; **COA Brief Exhibit 22.** Defendants are judicially estopped from taking a contrary position in this case without having provided the interpretation of taxpayer protections and recourses required under section 5 of the Taxpayer Bill of Rights.

D. The Department's Public Position That the Court of Claims Has Jurisdiction Over Claims Involving the MBT Act Film Credit Was the Same Position Taken by the Department During its Audit of Teddy 23 and its Discussions with MPC -- A Position on Which Plaintiffs Relied.

The position taken by the Film Office and Department in their motions for summary disposition was also a direct reversal of the position they took in this very case. Investigator

[7] In each Court of Claims case, Defendants followed the Department's typical method of settlement: a settlement agreement is signed by the parties under which the Department concedes all or part of the film credit in exchange for the plaintiff's voluntary dismissal of the complaint. *Pls' Resp Br*, p 12, n 4 & Exs 1, 5-12; **COA Brief Exhibits 4-12.**

Clark-Pierson's email plainly evidences a 60-day "appeal period." *Pls' Resp Brief*, p 3 & Ex 2; **COA Brief Exhibit 19.** The 60-day appeal period is consistent with the 90-day Court of Claims appeal period in MCL 205.22; that is, film credit claimants may have 90 days to file a formal appeal, but the Department may operate internally on a 60-day timeline. Plainly, the 60-day "appeal period" expressly directed to the Plaintiffs in correspondence from the Department is more reflective of the 90-day appeal period under the Revenue Act. The 60-day "appeal period" under which the Department operated in rescinding and reissuing the denial was directly contrary to the 21-day appeal period Defendants have alleged under MCR 7.104(A).

Critically, neither the Department nor its Film Office advised Teddy 23 or MPC of the alleged 21-day appeal period or advocated for the 21-day appeal period under MCR 7.104(A) and MCL 600.631. To the contrary, Ms. Clark-Pierson obtained a rescission and reissuance of the denial letter on August 16, 2013, nearly 60 days after it was issued on June 20, 2013. *Am Compl*, ¶138 & Ex A; **COA Brief Exhibit 17**. This began the period of rescinding and reissuing the denial letter in 60-day increments, a process repeated three separate times through December of 2013. *Am Compl*, ¶¶138, 144 & Ex A; **COA Brief Exhibit 17**. Neither the Department nor the Film Office operated under the 21-day appeal period. They operated directly contrary to it. Thus, collectively, their actions and advice failed to meet the notice standards required by the Revenue Act or, for that matter, the constitution. See Const 1963, art 1, §17; US Const, Am XIV. See also *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014).

Plaintiffs are indistinguishable from any other film credit claimants, yet they were singled out by Defendants and the Court of Appeals in their retroactive application of a new interpretation contrary to the purpose of the Taxpayer Bill of Rights. The Court of Appeals failed to recognize, at a minimum, that there were genuine issues of material fact regarding the

Film Office's role in this matter, failed to address the audit, the process of rescission and reissuance of the denial letter, and the lack of constitutionally required notice. The Court of Appeals' Opinion was error and the Michigan Supreme Court should grant leave to appeal.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DELAYED APPLICATION FOR LEAVE TO APPEAL WHEN THE APPLICATION SOUGHT TO REMEDY THE DENIAL OF DUE PROCESS AND THE DEFENDANTS' UNLAWFUL ACTIONS RESULTED IN THE DELAY.

A. Standard of Review.

Generally, a circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. Const 1963, art. 6, §28; *Boyd v Civil Svc Comm'n,* 220 Mich App 226, 232; 559 NW2d 342 (1996). This Court reviews a trial court's denial of a delayed application for leave to appeal for an abuse of discretion. *People v Melotik,* 221 Mich App 190, 196; 561 NW2d 453 (1997). An abuse of discretion occurs when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006).

B. The Circuit Court Had Express Authority to Grant a Delayed Application for Leave to Appeal.

Under MCR 7.103(B)(4), the circuit court may grant leave to appeal from a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal. While an application for leave is generally required within 21 days of an agency decision, MCR 7.105(A)(1), a late application is authorized, provided the applicant file a statement of facts explaining the delay, MCR 7.105(G)(1).

Plaintiffs immediately sought judicial review of the denial of the MBT film credit *in the Court of Claims* -- after their last meeting with the Department. *Pls' Resp Brief*, pp 2-3 & Exs 3-4; *Application*, pp 5-6. The Court of Claims filing was consistent with Defendants' public treatment of film credit appeals and with the "appeal period" they espoused during the two-year-long review process. *Pls Resp Br*, pp 3-4; *Application*, pp 16-17. In response to the Court of Claims Complaint, Defendants reversed their interpretation of the statutes governing its actions -- which would normally be afforded great deference[8] -- and contrary to its continuing audit and its practice of rescission and reissuance of the denial letter in 60-day appeal periods, took a new and previously undisclosed (MCL 205.5) legal position that Plaintiffs were required to have filed an appeal in the Circuit Court within *21 days* of the December 11, 2013 decision. *See Defendants' Motions for Summary Disposition*; *Application*, pp 5-6, 16-17. This issue was both contrary to the Department's public position and was one of first impression.

In order to preserve its appeal rights while awaiting a decision from the Court of Claims on the jurisdictional issue, and as soon as it became apparent that the Court of Claims would not decide the motions raising the jurisdictional issue before the 6-month deadline in MCR 7.105(G)(2), Teddy 23 and MPC timely filed its Delayed Application in the Circuit Court. Because the jurisdictional issue raised in the Court of Claims was one of first impression, the Department proposed that the parties stipulate to hold the Circuit Court proceedings in abeyance pending the Court of Claims' decision on the jurisdictional issue. Plaintiffs agreed and the Department prepared and filed the stipulation. See **COA Brief Exhibit 20.** Despite the Stipulation, the Circuit Court -- without any explanation or reason given -- denied the Application. **COA Brief**

[8] "[U]nless an interpretation is clearly wrong we will generally defer to the construction given a statute by the agency charged with its interpretation." *Motycka v Gen Motors Corp*, 257 Mich App 578, 580–581; 669 NW2d 292 (2003).

Exhibit 2. The Circuit Court then, again without explanation and without addressing the constitutional harms underlying the filing in its court, denied a motion for reconsideration. **COA Brief Exhibit 3.**

The Circuit Court's decision constitutes an abuse of discretion, as it falls outside the range of "reasonable and principled outcomes." *Maldonado*, *supra*, 476 Mich at 388. The Michigan Constitution provides for judicial review of agency determinations. Const 1963, art 6, §28. A trial court may grant a late appeal where good cause is shown. *Herman v Chrysler Corp*, 106 Mich App 709, 717; 308 NW2d 616 (1981). Under the circumstances in this case, Teddy 23 and MPC established good cause for granting a late appeal. As the Application makes clear, the delayed Application was filed in response to the new jurisdictional position taken Defendants that was applied retroactively to Plaintiffs without the Department having complied with mandate of MCL 205.5. Defendants arbitrarily changed the rules contrary to their longstanding practice, one evident in multiple filings before the Court of Claims. They not only changed their interpretation of the appeal period applicable in this type of case but also changed their interpretation as to which court had exclusive jurisdiction. The Application was a direct response to the Department's changed position -- which was not revealed to Plaintiffs until after the alleged 21-day appeal period. Thus, the only means to challenge the interpretation was through a delayed application. Good cause existed.

Importantly, neither the Department nor its Film Office answered the Application or challenged the reason for the delay. While a circuit court clearly may consider these reasons for delay in deciding whether to grant an application, MCR 7.105(G)(1), it is not clear what -- if anything -- the Circuit Court considered in this case given its summary denial of the Application. Because Defendants chose not to respond, there was no reason proffered, or any opposition in

the record, on which to deny the Application. The Circuit Court did not express any disagreement with or concern over the undisputed reason for the delay. Nor did it find any issue with the merits of Plaintiffs constitutional claims. Cf. *Melotik, supra*, 221 Mich App at 196 (trial court indicated dissatisfaction with reasons given for the delay in filing the application and stated that the reason for its denial was based on lack of merit of the appellant's claims). The record is silent.

Whether and how the Circuit Court exercised its discretion cannot be determined without an explanation – or at least some indication that it recognized it had the discretion to act. *People v Cherry*, 393 Mich 261, 261; 224 NW2d 286 (1974). Here, *no* explanation was given. See **COA Brief Exhibits 2, 3.** Rather, the circuit court simply denied the Application without any reason, utilizing a "check the box" court form (CC 299). **COA Brief Exhibit 2.** Three days later the same court entered an order holding the case in abeyance, **COA Brief Exhibit 21**, which indicates that the Circuit Court was likely not aware of the circumstances of this case when it acted. This indicates that the Circuit Court failed to exercise *any* discretion in this case, which is itself an abuse of discretion. *People v Stafford*, 434 Mich 125, 134 n4; 450 NW2d 559 (1990). In denying the subsequent motion for reconsideration, the Court's order justified the denial solely on the basis that the Delayed Application for Leave was filed close to the end of the six month for such applications, entirely ignoring the interplay of the pending Court of Claims action or other factors justifying the delay. The Circuit Court thus failed to apply the reasonable and principled deliberation required of it.

The link between courts and litigants is the written word, which is the source and the measure of the court's authority. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44, 59 (2009) ("a court speaks through its written orders and judgments"). Providing detailed

explanations underlying a court's decision empowers litigants to protect their own interests and complements the court's efforts to achieve accuracy. A decision that offers no guidance on "essential questions" neglects the courts' "duty to the citizens of Michigan to serve as the final arbiter of the law." *Citizens Protecting Michigan's Constitution v Sec of State*, 482 Mich 960; 755 NW2d 157 (2008), (Kelly, J., dissenting from denial of leave to appeal) (stating also that "[b]oth the parties and reviewing judges in the appellate process are entitled to something more on the part of the trial court than a conclusory statement"). For these reasons, the Circuit Court's denial of the Application constitutes an abuse of discretion and must be reversed.

The public policy of this state favors the meritorious determination of issues. *Huggins v Bohman*, 228 Mich App 84, 86; 578 NW2d 326, 328 (1998). See also *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 214 n1; 850 NW2d 667 (2013) (recognizing the "overall public policy of preferring to resolve disputes on the merits instead of technicalities"); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) ("the law favors the determination of claims on the merits"). Courts have long recognized that a litigant is entitled to a forum to resolve claims on their merits.[9]

The Court of Appeals' Opinion repeats the lack of analysis provided by the Circuit Court. The Opinion does not address whether the constitutional remedy for misleading notice mandates granting of the application for leave. Plaintiffs are left to guess why the Application was denied. This failure on the part of the Circuit Court constitutes an abuse of discretion, disregards the constitutional requirements of due process and deprives the parties of a decision on the merits,

[9] "[T]he Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.'" *Valley Forge Christian Coll v Ams United for Separation of Church & State*, 454 US 464, 490 (1982) (Brennan, J., dissenting) (internal citation omitted).

which would provide this Court the ability to exercise meaningful review. See *Citizens Protecting*, *supra*, 482 Mich at 960; *Tyra*, *supra*, 302 Mich App at 214, n1. The Michigan Supreme Court should grant leave to appeal.

IV. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE COURT OF CLAIMS LACKED SUBJECT MATTER JURISDICTION OVER A FILM CREDIT UNDER THE MBT ACT.

The Court of Appeals summarily determined two disputed facts: that the Department had no substantive decision making and that it did not take any action in determining to deny the post-production certificate. Both factual determinations are undermined by the Court of Appeals discussion of the facts in its Opinion.

Resolution of the jurisdictional issue presented in this appeal requires interpretation and application of various statutes, including the MBT Act, MCL 208.1455 and MCL 208.1513, the Revenue Act, MCL 205.22, the Revised Judicature Act, MCL 600.631, and the Court of Claims Act, MCL 600.6419. See **COA Brief Exhibit 1, pp 7-11.** The interpretation and application of a statute is also a question of law that this Court reviews de novo. *Parkwood Ltd Hous Ass'n v State Hous Dev Auth*, 568 Mich 763, 767; 664 NW2d 185 (2003).

> The jurisdiction of the Court of Claims is mandated by law.
>
> The Court of Claims has the power and jurisdiction:
>
> [t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1)(a).]

This jurisdiction (subject to limited exceptions) is exclusive. MCL 600.6419(1).[10]

[10] Circuit courts have jurisdiction over a taxpayer's claim for money damages only if a specific statute expressly confers jurisdiction. MCL 600.6419(4). Where, however, the complainant seeks equitable or declaratory relief in addition to money damages against the state,

If there were ever a single area of law that always concerns a claim against the state for money, it is tax law.[11] And whenever there is a question involving collection of a state tax, it always involves the Department of Treasury. The Department is the state agency responsible for the collection of taxes. MCL 205.1(1). In administering taxes, the Legislature directed that the Department must follow the provision of the Revenue Act: "[u]nless otherwise provided by specific authority in a taxing statute administered by the department, all taxes shall be subject to the procedures of administration, audit, assessment, interest, penalty and appeal provided in sections 21 to 30." MCL 205.20. The MBT Act dictates that it is to be administered under the Revenue Act. MCL 208.1513(1).

The Legislature is equally clear that disputes over taxes administered by the Department are to be heard exclusively in the Tax Tribunal or Court of Claims. MCL 205.22(1). As this Court has explained in *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 679; 621 NW 2d 707 (2000):

> A litigant seeking judicial review of an administrative agency decision has three potential avenues of relief: (1) the method of review prescribed by statutes applicable to the particular agency; (2) the method of review prescribed by the APA, MCL 24.201, *et seq*.; or (3) an appeal under MCL 600.631, a provision of the Revised Judicature Act.
>
> The statutes applicable to the Department of Treasury provide for review in the Tax Tribunal or the Court of Claims. See MCL 205.22(1). Specifically, MCL 205.22(1) provides that "[a] *taxpayer* aggrieved by an assessment, decision, or

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the Court of Claims is the sole forum that is capable of deciding the case. *Silverman v Univ of Mich Bd of Regents*, 445 Mich 209; 516 NW2d 54 (1994); MCL 600.6419. For this latter reason, cases in the circuit courts arising out of the same transaction or series of transactions may be joined with the Court of Claims case. MCL 600.6421.

[11] Teddy 23 sought a refundable tax credit under MCL 208.1455(8); that is, if the tax credit exceeds the MBT liability, the Department is required to "refund the excess or pay the amount of the credit to the company." MCL 208.1455(8). The entire purpose of MCL 208.1455 is to set out the procedural steps necessary to arrive at a refund. A refund is plainly "a claim or demand" and, depending on the circumstances, the claim may be "liquidated [or] unliquidated." MCL 600.6419(1)(a).

> order of the department may appeal the contested portion...to the tax tribunal...or to the court of claims." [Emphasis added.]

Examining the history of prior tax-specific administrative appeal mechanisms, this Court went on to explain in *Jackson Community College, supra,* that neither the APA nor the Revised Judicature Act applies when an adequate avenue exists by statute, and the Court found Section 22 of the Revenue Act, MCL 205.22, provided that "adequate avenue." *Id.* at 682. See also MCL 600.631.[12] Section 22 contains a specific authorization and a statutory procedure for invoking the Court of Claims jurisdiction. Specifically, Section 22 of the Revenue Act provides that a taxpayer "aggrieved by…[a] decision, or order of the department" may appeal to the Michigan Court of Claims within 90 days. MCL 205.22(1). The provision does not exclude "decisions" made by the Department de facto, made through an agency within its organizational control, or made by the Department in some other capacity if, in any instance, the decisions regard a tax administered under the Revenue Act.

If exceptions existed, the Department was statutorily-mandated to provide notice of such in a brochure. MCL 205.5. The Revenue Act mandates that the Department issue appellate guidance to taxpayers in the form of a brochure, explaining how to exercise their appellate rights in the event they wish to challenge an administrative or judicial decision regarding their tax liability. MCL 205.5.

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[12] MCL 600.631 provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules **from which an appeal or other judicial review has not otherwise been provided for by law**, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court. [Emphasis added.]

The Court of Claims and Court of Appeals misinterpreted and misapplied the MBT film credit statute. Section 455 of the MBT Act, MCL 208.1455, sets forth the Department's statutory duties regarding the film credit. Because the film credit statute is within the MBT Act, and because the MBT Act is administered under the Revenue Act, the Court of Claims erred in concluding that the Department's actions under MCL 208.1455 are not subject to review under the Revenue Act.

The fact that the Film Office has some limited role with regard to administration of the film credit is irrelevant. The MBT Act, MCL 208.1455, does not distinguish between the determination to provide a refund or credit and the amount determined to be credited or paid. Indeed, the Department made no distinction in its administration of MCL 208.1455. It treated this credit like any other MBT Act credit: it approved the agreement, audited the expenditures, determined whether the credit should be granted (and the amount), and paid the credit.

For these reasons, the Court of Appeals erred in affirming the Court of Claims grant of summary disposition in favor of Defendants for lack of subject matter jurisdiction. Defendants clearly were not entitled to judgment as a matter of law. And, at a very minimum, there were genuine issues of material fact that precluded summary disposition. Thus, the Court of Appeals decision should be reversed. See, e.g., *Walker*, *supra*, 217 Mich App at 719; *Ruff v Isaac*, 226 Mich App 1, 9-10; 573 NW2d 55 (1997).

V. THE COURT OF APPEALS ERRED IN FAILING TO PROVIDE ANY RELIEF IN EITHER THE COURT OF CLAIMS OR CIRCUIT COURT TO REMEDY FOR THE DENIAL OF DUE PROCESS AND RETROACTIVE INTERPRETATION OF LAW.

In this case, the actions of Defendants in repeatedly referencing a 60-day appeal period and in continuing deliberations regarding the merits of Teddy 23's film credit during each of the four successive 60-day periods induced Teddy 23 and MPC to believe that the 60-day period was

the relevant appeal period. Defendants retroactively changed their legal position during this case. They did so without providing any public notice of their position as required in MCL 205.5. They did so contrary to legal positions taken in Michigan courts. Plaintiff's justifiably relied on these representations because of the reasonable expectation that the agency administering the law was aware of the applicable period for an appeal of its own decisions; and, it would clearly be prejudicial for Defendants to dispute that they induced Teddy 23 and MPC to rely on that representation. For these reasons, and the reasons stated above, the doctrine of equitable estoppel requires that Plaintiffs be afforded an opportunity to litigate the merits of their claim, and to demonstrate the error in the denial of the credit, and that Defendants be precluded from denying the right to judicial review.

VI. THE COURT OF APPEALS ERRED IN FAILING TO ADDRESS PLAINTIFFS' CONSTITUTIONAL CLAIMS THAT THEY WERE DENIED THEIR RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

Fundamental to Teddy 23 and MPC's claims of appeal is their contention that they were denied the opportunity to be heard on their challenge to the denial of the Certificate, whether in the Court of Claims or Circuit Court, and that they were treated differently than other similarly-situated taxpayers. As discussed herein, this denial constitutes a deprivation of Teddy 23 and MPC's constitutional right to due process and equal protection, and provides a basis for relief from the lower court orders.

A. The Denial of the Postproduction Certificate and Subsequent Decisions by the Lower Courts Deprived Teddy 23 and MPC of Their Constitutional Right to Procedural Due Process.

It is well-established in both state and federal constitutional jurisprudence that, at a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. *Bonner*, *supra*, 495

Mich at 235; *Mullane*, *supra*, 339 US at 313. "To comply with these procedural safeguards, the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Bonner*, *supra*, 495 Mich at 235 (quoting *Armstrong v Mazzo*, 380 US 545, 552 (1965)). Tax enforcement that is arbitrary, that is inspired by bias, or that *fails to extend the procedural safeguards normally due* violates the Michigan and United States Constitutions. Const 1963, art 1, §17; US Const Am XIV.

The action by the Department is fraught with due process violations. For example, in preparing the request for Certificate of Completion, the independent auditor sought to ensure it complied with all applicable rules, regulations and policies and that it supplied all necessary information to Defendants. *Am Compl*, ¶121 & Ex I. Defendant Department, through Ms. Clark-Pierson, specifically directed the independent auditor not to review financial records of third-party vendors. *Am Compl*, ¶117 & Ex I. The Department knew that the independent auditor would follow its direction and, in fact, the independent auditor relied on Department's direction and did not assemble or review all records of the third-party vendors. *Am Compl*, ¶120. Nevertheless, after the two-year audit, Defendants concluded that the independent audit was inadequate because it failed to review the very records of third-party vendors. *Am Compl*, ¶135 & Ex J; **COA Brief Exhibit 18.** In defense of the misdirection, Ms. Clark-Pierson falsely represented to the Film Office that the independent auditor had advised her that third-party vendor records did not exist. *Am Compl*, ¶¶119, 136.

Moreover, as discussed above, the Department is statutorily required to advise taxpayers of their appeal remedies, MCL 205.5, and has issued a *Taxpayer Rights Handbook* advising MBT litigants to appeal to the Court of Claims. Plaintiffs followed those instructions in appealing the denial of the credit to the Court of Claims. Then, in an attempt to deny Plaintiffs

an opportunity to challenge the Defendants' actions in this case, Defendants moved to dismiss the Court of Claims action claiming that the appeal was required to be filed in circuit court within 21 days. Defendant Department knowingly provided appellate direction to Plaintiffs that the Department has since claimed was unlawful for the purpose of denying Plaintiffs any appeal.

Further, these actions of the Department, in conjunction with the Department's unsupported conclusions of "fact" rise to the level of fraud, which invalidates the denial. A process marked by administrative fraud, whether actual or constructive, is not the process that complies with our state and federal constitutions. In fact, our courts have recognized that taxpayers should not be subjected to tax liability that results from fraudulent practices of governmental agencies. See, e.g., *Copper Range Co v Adams Twp*, 208 Mich 209, 217; 175 NW 282 (1919) (courts properly void tax assessments where they are based on fraud or an adoption of a fundamentally wrong principle); *Grand Rapids Steel & Supply Co v City of Grand Rapids*, 35 Mich App 59, 65; 192 NW2d 376 (1971) (a tax assessment is fraudulent if there is "something that in legal effect is the equivalent of intention or fraudulent purpose to overvalue the property and so to set at naught fundamental principles that safeguard the taxpayer's rights and property").

In this case, Defendants breached legal and equitable duties and made deceptive representations that they knew Plaintiffs would rely upon, to their detriment. Such actions are fraudulent and demonstrate disregard for the fundamental principles in place to safeguard a taxpayer's rights and property. *Grand Rapids Steel*, *supra*, 35 Mich App at 65. The Defendants' actions in this case reflect either a misunderstanding or disregard for the statutory process, and entirely thwarts the process contemplated by and mandated by the Legislature in Section 455.

Further, the purpose of the notice requirement in the Due Process Clause is to ensure taxpayers have an opportunity to challenge the accuracy and legal validity of their tax obligations. *McKesson Corp v Div of Alcoholic Beverages & Tobacco*, 496 US 18, 36 (1990). Valid notice "must not make any misleading or untrue statement" or "fail to explain or omit any fact which would be important to the taxpayer . . . in deciding to exercise his right." *Trussell, supra*, 147 Mich App at 323-324. Without notice, the right to be heard has little reality or worth. *Mullane, supra*, 339 US at 314. For a notice to pass constitutional muster, it must -- on its face -- explain the right and what is required to exercise that right. *Alan, supra*, 388 Mich at 352.[13] As here -- there is a failure of notice, no assessment, decision, or order of the Department is deemed to have been issued to trigger the running of an appeal period. *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 118-119; 845 NW2d 81 (2014).

The constitutional concerns stemming from the Department's decision were exacerbated by the Court of Claims and Circuit Court orders closing the courthouse doors to Plaintiffs, and denying the opportunity for judicial review of the Department's decision. The lower court decisions essentially rubberstamped the last-minute change in the Film Office and Department's position regarding the proper appellate procedure in a film credit case. As stated above, courts should not condone such "bait and switch" actions or mid-course changes when dealing with tax remedies or tax schemes. See *Reich, supra*, 513 US at 111. In fact, it is a violation of the Due Process Clause for a governmental agency to offer one set of remedies and then change the remedy scheme to eliminate any redress. *Id.*

The respective decisions rendered by the Court of Claims and Circuit Court affirmed the Department and Film Office's defective notice and arbitrary tax enforcement, further denying

[13] Thus, it is not surprising that there are constitutional protections in the Revenue Act and the *Taxpayers Bill of Rights*, MCL 205.5.

Teddy 23 and MPC their constitutional right to procedural due process. For this reason, Plaintiffs are entitled to relief.

B. The Denial of the Postproduction Certificate and Subsequent Decisions by the Lower Courts Deprived Teddy 23 and MPC of Their Constitutional Right to Equal Protection.

Further, because the Department has treated Plaintiffs differently than other similarly-situated taxpayers, Defendants' action in this matter violated Plaintiffs' rights under the Equal Protection Clause. The Equal Protection Clauses of the Michigan and federal constitutions and the Uniformity of Taxation clause of the Michigan constitution require that no person be denied the equal protection of law. Const 1963, art 1, §2; Const 1963, art 9, §3; US Const, Am XIV. See also *Armco Steel Corp v Dep't of Treasury,* 419 Mich 582; 358 NW2d 839 (1984) (noting that "in cases involving taxing statutes, there is no discernable difference between the Equal Protection and Uniformity of Taxation Clauses").

The purpose of Michigan's Uniformity of Taxation Clause, Const 1963 art 9. §3, is to guarantee equal treatment of similarly situated taxpayers. *Ann Arbor v Nat'l Center for Mfg Sciences Inc,* 204 Mich App 303, 305; 514 NW2d 224 (1994). To establish a claim of disparate treatment, Plaintiffs must establish that the Defendants failed to issue the Certificate of Completion in a manner that it has applied to similarly situated taxpayers and the Defendants' failure to do so was intentional not by mistake or inadvertence. *Armco Steel Corp, supra,* 419 Mich at 592. "Some rational basis for a disputed classification must be shown to exist." *Id.* The remedy for disparate treatment is cancelation of the assessment or award of the requested refund. *Id.*; *MCI Telecom Corp v Dep't of Treasury,* 136 Mich App 28; 355 NW2d 627 (1984). Defendants' actions in this case exceeded their statutory authority and, where they did exercise authority granted to them, they did it in a manner that was not supported by the law or the facts,

and was different than how they applied the law to other similarly-situated eligible production companies/MBT taxpayers.

Defendants' guidelines for an independent audit do not require that third-party vendors' financial statement be audited unless the vendor is operating under a production services agreement, and, Defendants specifically directed that no third-party documents be compiled. Yet the independent auditor's compliance with that directive is at the core of Defendants' fraud allegation: deductive reasoning in the absence of the records. Further, the Department's new position on the jurisdictional issue conflicts with the position it has taken in other film credit cases. See **COA Brief Exhibits 4-12.**

Defendants' treatment of Plaintiffs in its reversal of its audit and appeal positions is without a rational basis. The Department's actions were constitutionally infirm, and the lower court decisions again exacerbate these concerns. For these reasons, the Court of Appeals decision must be reversed.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Plaintiffs Teddy 23 and MPC respectfully request this Court summarily reverse decision of the Court of Appeals and remand this case for a determination on the merits in the Circuit Court or Court of Claims, or alternately, grant this application for leave to appeal.

Respectfully submitted,

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